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In the Supreme Court
of the United States

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Tractor Training Service, an Oregon corporation, Tractor Training Service, Inc., an Illinois corporation, and Joy E. Badley, petitioners herein, pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the decree of that Court entered on or about the 8th day of December, 1955, affirming an order of the Federal Trade Commission (hereinafter called "Commission") dated March 3rd, 1954, under the provisions of Sec. 5 of the Federal Trade Commission Act (15 U.S.C.A. 45).

OPINION BELOW

The Findings of Fact, Conclusion and Order of the Commission are set forth in pages 70-95 of the Transcript of Record herein. The Opinion of the Court of Appeals for the Ninth Circuit is not yet reported but appears on pages 23-32 of Appendix A herein.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was rendered on the 7th day of November, 1955, and its Decree was entered on the 8th day of December, 1955. Rehearing was denied by order entered on the 12th day of December, 1955.

Jurisdiction of the Federal Trade Commission in this cause was asserted under the provisions of the Federal Trade Commission Act, Sec. 5(b) (15 U.S.C.A. 45(b)). Jurisdiction of the Court of Appeals for the Ninth Circuit was invoked by petitioners under the provisions of Sec. 5(c) of the Federal Trade Commission Act (15 U.S.C.A. 45(c)). Jurisdiction of the United States is invoked under 28 U.S.C.A. 1254(1), and Sec. 5(c) of the Federal Trade Commission Act, (15 U.S.C.A., Sec. 45(c)) and Sec. 10 of Administrative Procedure Act (5 U.S.C.A. 1009).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission may, over timely and repeated objections, legally disregard the following provisions of the Administrative Procedure Act (and its own rules) on the grounds of convenience and/or economy:

(a) The provisions of Sec. 11 (5 U.S.C.A. Sec. 1010; Federal Trade Commission Rule XIV) requiring that examiners "be assigned to cases in rotation * * *."

(b) The provision of Sec. 7(a) (5 U.S.C.A. Sec. 1006(a); Federal Trade Commission Rule XV(d)), specifying the circumstances in which a substitution of hearing examiners may be made.

(c) The provisions of Secs. 5(c), 7(b) and 8(a) (5 U.S.C.A. Secs. 1004(c), 1006(b), 1007(a); Federal Trade Commission Rules XIV(8) and XXII), requiring that the initial decision in a proceeding such as herein involved shall be made by the trial examiner who heard the evidence unless he shall have become "unavailable".

STATUTORY PROVISIONS INVOLVED

No Constitutional provisions are involved in this proceeding. The pertinent statutory provisions are set forth in Appendix B. Those pertaining to the jurisdiction of this Court appear on page 37. The provisions of the Federal Trade Commission Act governing appeals appear on pages 39, 40, and the pertinent provisions of the Administrative Procedure Act are set forth on pages 41-48.

STATEMENT

The facts material to the instant petition are not in dispute. They affirmatively appear in the findings, orders and decisions in the record.

This proceeding was originally instituted by the Federal Trade Commission against these petitioners (and

others) by a complaint, which complaint contained the notice that the proceedings had been assigned to J. Earl Cox, a hearing examiner of the Federal Trade Commission. The ensuing proceedings are recounted in the Opinion of the Court below as follows: "Hearings in this case were first held in Washington, D. C., starting March 10, 1952, and continuing for two days. At this hearing, Examiner J. Earl Cox presided. J. E. Badley was the only witness examined. Examiner Cox ordered a recess until April 24, 1952, at which time the hearings were resumed with Examiner Everett F. Haycroft. The substitution of examiners was promptly challenged by petitioners as a violation of requirements that examiners be assigned in rotation. In overruling the objection, the Commission gave as its reason for the substitution of Examiner Haycroft that other hearings were to be held by him in the western part of the United States, where future hearings in the instant case were scheduled, hence the substitution was in interests of economy." (Appendix A, p. 25). The substitution of hearing examiners was made by the Federal Trade Commission upon its own motion and without notice to these petitioners (T.R. p. 32). At the time the hearings were resumed before Examiner Haycraft, petitioners renewed their objections (T.R. p. 196) and on later occasions they persisted in standing on said objections. Their objections to the substitution were renewed at the close of the hearings before the trial examiner and later before the Federal Trade Commission, and on each occasion they were overruled (T.R. pp. 66, 67). In its final decision the Commission, after noting that petitioners had

declined to waive their right "to challenge the authority of the Commission to order substitution in the first instance", continued: "In circumstances such as this one, where it clearly appears that substitution will effect great savings to the Government and likely will result only in slight inconvenience and expense to the respondents, the Commission manifestly has the duty to take the steps required to effect such economy * * *. Respondents' objection to the Commission's action here are without merit * * *." (T.R. p. 67).

At the initial hearing in Washington, D. C., in addition to the oral testimony adduced, some 47 Commission exhibits together with some 14 respondents' exhibits were identified and with few exceptions received. Contrary to the statements in the Opinion of the Court below, a transcript of the Washington testimony WAS NOT, introduced at a subsequent hearing before Examiner Haycraft, and Examiner Haycraft DID NOT, hear all the testimony. The witness, Badley, was recalled as respondents' witness later but DID NOT cover "substantially the entire ground gone over in Washington, D. C." — indeed, practically none of it.

Nevertheless, Examiner Haycraft ALONE made the initial decision including the findings of fact "which in large part were adopted by the Commission" (Appendix A, p. 25) and affirmed by the Court below.

SPECIFICATIONS OF ERRORS TO BE URGED

It is respectfully submitted that the Court of Appeals in its decision in this case erred in the following particulars:

1. In affirming the Federal Trade Commission's decision that it could disregard the provisions of the Administrative Procedure Act requiring examiners to be assigned to cases in rotation and do so upon self-determined considerations of convenience or economy and over timely objections.

2. In holding that the Federal Trade Commission may, regardless of timely objection, remove a hearing examiner during the conduct of a case and substitute another in circumstances other and different than those carefully spelled out in the Administrative Procedure Act as authorizing a substitution.

3. In holding that the substitute hearing examiner could render a valid initial decision although he did NOT preside at all of the hearings and did NOT hear all of the evidence, and although the original hearing examiner was NOT "unavailable".

4. In apparently holding that petitioners' timely objections to the illegal substitution of hearing examiners, to be tenable, must be supported by allegations and proof of an evil motive on the part of the Federal Trade Commission or of bias or prejudice on the part of the substitute trial examiner.

5. In apparently holding that petitioners' timely and repeated objections to the illegal substitution of hearing examiners were nullified because the Federal Trade Commission "afforded them an opportunity to start anew".

REASONS FOR GRANTING THE WRIT

The questions decided by the Court below and presented by the instant petition are important issues of federal law with far-reaching and significant implications.

The decision of the Court of Appeals would provide judicial approval of practices that would make it legally possible for any administrative agency (1) to assign any examiner to any case, (2) to substitute examiners from time to time at pleasure, during the course of a proceeding, and (3) to select any examiner it might choose to render the initial decision.

The decision of the Court below is contrary to the clear and "mandatory" provisions of the Administrative Procedure Act; it is inconsistent with decisions of the Supreme Court interpreting that Act; and it is in conflict with decisions of other courts of appeal. The provisions and decisions with which the decision below is in irreconcilable conflict (and hereinafter cited and discussed) hold in substance as follows:

1. Provisions of the Administrative Procedure Act are mandatory and must be literally complied with.

2. "A litigant who makes a demand at the time of a hearing is entitled to an examiner chosen as the Act provides."

3. Substitutions of hearing examiners cannot be made except in the circumstances provided for in the Act.

4. An initial decision rendered by a substitute hearing examiner who presided at only part of the hearings

and heard only part of the evidence is invalid and a Commission order based thereon is a nullity.

5. It is not necessary that a litigant support his objections to the illegal substitution of hearing examiners by proving an evil motive of the Commission or bias or prejudice of the substitute trial examiner.

6. Considerations of inconvenience or added expense will not justify disregard of the provisions of the Administrative Procedure Act.

7. An illegal substitution of hearing examiners is not cured by the substitute hearing examiner giving the litigant the opportunity to start the proceeding all over again.

ARGUMENT AND CITATIONS

In a characteristically succinct statement, Mr. Justice Brandeis has recorded a basic tenet of American jurisprudence: "In the development of our liberty, insistence upon procedural regularity has been a large factor." Bordeau vs. McDowell, 256 U.S. 465 (477).

For reasons too obvious to require recitation, the preservation and "deveolpment of our liberty" is, to an unusual degree, dependent upon "procedural regularity" in the administrative field. The legislative history of the Administrative Procedure Act testifies to a clear recognition of this fact. "No more satisfactory way can be found of minimizing abuses, or fear of abuses, than by legislative statement of standards of administrative procedure to chart the course of action * * *."

> The Final Report of the Attorney General's Committee, Senate Document 8, 77th Congress, First Session, Page 215.

Congress itself, in Sec. 12 (5 U.S.C.A. 1011) of the Administrative Procedure Act, seems clearly to have declared that the procedural requirements of the Act shall be mandatory as to all agency proceedings initiated subsequent to the effective date.

The record herein admits of no dispute as to the facts upon which the three contentions here advanced are based.

1. Examiner Haycraft was not assigned to this case "in rotation as near as practicable" or "in rotation" at all. He was assigned upon the explicitly and repeatedly asserted considerations of convenience and economy.

2. The substitution of Examiner Haycraft for Examiner Cox was not made because Examiner Cox had withdrawn or was disqualified. No such contention is made.

3. Examiner Haycraft did NOT preside at ALL of the hearings and he did NOT hear ALL of the evidence. Nevertheless, he ALONE made the initial decision even though Examiner Cox was NOT "unavailable".

I.

ASSIGNMENT IN ROTATION

Sec. 11 of the Administrative Procedure Act. (5 U.S.C.A. 1010) provides the manner of appointment of hearing examiners, "who shall be assigned to cases in rotation as far as practicable * * *." This section was

considered by the Supreme Court in the following cases:

Wong Yang Sung vs. McGrath, 339 U.S. 33, 70 S. Ct. 445.

Riss & Company vs. United States, 341 U.S. 907, 71 S. Ct. 620.

U. S. vs. L. A. Tucker Truck Lines, 344 U.S. 33, 73 S. Ct. 67.

Ramspeck vs. Federal Trial Examiners Conference, 345 U.S. 128, 73 S. Ct. 570.

In the Wong Yang Sung case, this Court, after a careful review of the history of the Administrative Procedure Act, said:

> "One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies, whose customs had departed widely from each other. We pursue this no farther than to note that *any exception we may find it its application would tend to defeat its purpose.*" (Emphasis supplied) (U.S. p. 41; S. Ct. p. 450).

It held that the failure of the United States Commissioner of Immigation and Naturalization to accord an alien a hearing in accordance with the provisions of the Act and particularly in accordance with the provisions of Sec. 11 rendered the proceedings void.

In the Riss case, this Court in a per curiam decision citing the Wong Yang Sung case, held that in Interstate Commerce Commission proceedings must be before an examiner appointed in conformity with the provisions of Sec. 11; otherwise they are void.

These cases were discussed by this Court in the L. A. Tucker Truck Line case, wherein it was said of the Riss case:

> "That decision establishes only that a litigant in such a case as this who does make such a demand at the time of hearing is entitled to an examiner chosen as the Act provides." (U.S. p. 36; S. Ct. p. 68)

and further:

> "We hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearing." (U.S. p. 38; S. Ct. p. 69)

The majority decision that non-compliance with the provisions of Sec. 11 of the Administartive Procedure Act, although a fatal defect, would nevertheless be waived by failure to make a timely objection evoked vigorous dissenting opinions.

In the Ramspeck case, the Court considered for the first time the application of the provision that examiners "shall be assigned in rotation as near as practicable". It found in the majority opinion that "as far as practicable" did not preclude the classification of cases and the classification of examiners (as provided by Congressional Act) and the assignment of cases in rotation within those classifications. The limits of "permissible discretion" carefully defined in this decision preclude any possible interpretation which would sanction practically unlimited discretion. In any event the Court in the Wong Yang Sung case eliminated considerations of convenience or economy as a justification for disregarding the explicit provisions of the statute. It said (U.S. p. 46; S. Ct. p. 452):

> "Nor can we accord any weight to the argument that to apply the Administrative Procedure Act, to such

> hearings will cause inconvenience and added expense * * *. Of course it will, as it will in nearly every other agency to which it is applied, but the power of the purse belongs to Congress and Congress has determined that the price for greater fairness is not too high."

These decisions dispose of another contention, to-wit, that a litigant must show that the illegal action was prejudicial. In no case does the Supreme Court so hold, and in the L. A. Tucker Truck Lines case the Court specifically found that the appellee was not prejudiced. Mr. Justice Frankfurter in a dissenting opinion stated, "I see no reason to disagree with the Court's view that in this case non-compliance by the Interstate Commerce Commission with the requirements of the Administrative Procedure Act did not prejudice the appellee". (U.S. p. 38; S. Ct. p. 70)

II.

SUBSTITUTION OF EXAMINERS

Sec. 7(a) of the Act (5 U.S.C.A. 1006(a)) provides the occasion on which a substitution of hearing examiners may be made; specifically that he "may at any time withdraw if he deems himself disqualified"; or may be replaced "upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification * * *." The record affirmatively shows that the original examiner, Mr. Cox, neither withdrew nor was he disqualified. The reasons for these restrictions on substitution are found in the provisions of the Act to be discussed under the next point.

III.

INITIAL DECISION

In enacting the Administrative Procedure Act, Congress in three separate sections (Secs. 5(c), 7(b) and 8(a)) laid particular and repeated emphasis on the requirement that the initial decision should be made by the hearing examiner who heard the testimony unless he he became "unavailable". The mandatory character of this provisions was known to Examiner Haycraft, because he said:

> "* * * The law requires that I shall, unless there is waiver, take all of the evidence in the case in order to render a decision." (T.R. 197)

Nevertheless, petitioners refused to waive their objection but Examiner Haycraft heard the balance of the case and alone made the initial decision.

This practice by the Federal Trade Commission of making convenient substitutions of hearing examiners did not occur for the first time in this case. It was attempted and condemned in the earlier case of Gamble-Skogmola vs. Federal Trade Commission, 211 Fed. (2d) 106. In that case, although the original hearing examiner became "legally unavailable" by reason of retirement. Nevertheless the Court held the decision by a substitute hearing examiner invalid. The Court said in connection with the provisions of the Administrative Procedure Act that the hearing examiner who hears the testimony shall alone make the decision, (page 114):

> "Here Congress apparently felt the need to directly establish the general practice and policy in the ex-

> aminer system of having recommended for initial decisions made by the trial examiner who had received the evidence, and not by some other examiner, as a means of assuring proper credibility evaluation."

Continuing on page 118, the Court said:

> "It should also be said that we are not here concerned with whether a credibility evaluation from the opportunity to see and hear the conflicting witnesses testify would or would not result in a different recommended decision on the part of the examiner. Our inquiry is directed solely to the question of procedure, not results * * *."

In two recent Court of Appeals cases the question arose as to the validity of an order based on an initial decision rendered by a hearing examiner who had not heard all the evidence.

> Kuhn vs. C. A. B., 183 F. (2d) 839 (Syl. 4).
> N. L. R. B. vs. Stoker Company, 185 F (2d) 451 (Syl. 6).

In the former of these cases the Court justified the irregularity on the grounds that the record before the Board had been stipulated by the parties; in the latter case on the ground that the original examiner had died and was therefore "unavailable". These decisions carry the clear implication that departure from the statutory procedure is not to be permitted at the uncontrolled discretion or at the pleasure or convenience of an agency but must be justified on some compelling legal grounds.

> "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in section 12 of the Act that modification must be express." (Citing authorities)

Marcello vs. Bonds, 349 U.S. 302 (310), 75 S. Ct. 757 (762).

In a recent three-judge decision, Pincket vs. U. S., 105 Fed. Sup. 67, the Court said at page 73:

"It is conceded that the examiner who conducted the hearing in the instant case was not appointed in accordance with the statute (Administrative Procedure Act) and it follows that all actions of the Commission based on his report are lacking in legal validity.

"The failure of an admisitrative agency to hold a hearing in accordance with the provisions of the Administrative Procedure Act is a defect which invalidates the whole proceedings and may not be waived."

(In a later decision, this same Court held in accordance with the L. A. Tucker Truck Lines case that the defect might be waived).

The court below recognized the legal necessity that only the examiner who heard all the evidence could render the initial decision. The learned judge who wrote the opinion of the appellate court supported his decision by certain erroneous assumptions or mininterpretations of the record. He justified the illegal practice here complained of by asserting:

"Petitioners stood on their objections to a change of examiners. A transcript of the testimony of Mr. Badley taken in Washington, D. C. was introduced at a subsequent hearing at Portland, Oregon, and at the Portland, Oregon, hearing Mr. Badley again testified covering substantially the entire ground gone over in the Washington, D. C. hearing."

"Sec. 8(a) of the Administratice Procedure Act provides that the initial decision shall be made by the

> hearing officer who presided. Examiner Haycroft made the initial decision. The fact that he did not preside over the Washington hearing in no manner changed this situation. Examiner Haycroft heard all of the evidence and from the evidence formulated the first and only decision rendered. We think this was a full compliance with the requirements of Sec. 8(a)."

The record in this cause does not support the statement that a transcript of the witness's testimony taken in Washington, D. C. was introduced at a subsequent hearing. No such transcript was introduced, and petitioners objected to taking the testimony over (T.R. p. 196). On his subsequent appearance on the witness stand, the witness was on the stand but a short time and covered very little of the ground covered in some 140 pages of his Washington testimony. During the Washington hearings, some 47 commission exhibits and 14 respondents' exhibits were identified and offered in evidence, and these were not re-offered. It cannot correctly be said that "Examiner Haycroft heard all of the evidence". (The Court even mispelled Examiner Haycraft's name.)

These provisions of the Administrative Procedure Act are in harmony with well established principles inherent in constitutional due process. This Court has condemned the practice of one examiner or official hearing the testimony and another making the order on many occasions and under many circumstances.

> "There is thus no basis for the contention that the authority conferred by Sec. 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and

another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusion which he deems it to justify That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

Morgan vs. U. S., 298 U.S. 468, 36 S. Ct. 906 (911).

Under the foregoing rules, it is of no avail to contend that after all Examiner Cox heard testimony for only two days. The express requirement of the statute is that the hearing examiner who writes the initial decision shall hear all of the evidence unless he shall become "unavailable". If he can miss two days of the hearing, perhaps he could miss three, or ten. If exceptions are to be allowed, where are they to stop and who can stop them? Then what becomes of the "procedural regularity" which Justice Brandeis in the quotation above found so important to our freedom?

There remains only to consider whether a litigant's legal rights to a fair and statutory hearing can be dis-

regarded and brushed aside without any recourse by the ever handy device of granting it "the opportunity to start anew", that is, granting it the boon of "ordeal by litigation" and do so over timely objection (T.R. p. 196). Obviously if an administrative agency can cure an illegal substitution of hearing examiners ONCE by so simple a method, may it not do so TWICE or THRICE, or * * * ? If the safeguards Congress attempted to create can be so easily avoided and the purposes of this legislation can be so completely disregarded, then the Administrative Procedure Act may become an empty gesture.

CONCLUSION

The record in this case establishes clear and unequivocal violations by the Federal Trade Commission of five basic provisions of the Administrative Procedure Act and of its own corresponding Rules and Regulations. The only and the explicit justification offered was "inconvenience and added expense" incident to following the provisions of the law. Not only has similar conduct been condemned by the decisions referred to herein, but the decision of the Court of Appeals in the instant case which justifies and excuses disregard of Congressional mandate upon self-determined and piously phrased considerations of convenience and economy would make it entirely possible for an administrative agency to appoint any examiner it might choose for any case, to substitute examiners not only once but perhaps several times during the course of a proceedings, and to base its decision on the findings of a hand-picked hearing examiner who might have heard little or none

of the evidence—it would, in effect, defeat the basic purposes of the Act.

As stated by this Court in the Wong Yang Sung case:

"But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." (U.S. p. 41; S. Ct. 450)

Respectfully submitted,

McDANNELL BROWN,
Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, Petitioners,	)	No. 14346
vs.	)	
FEDERAL TRADE COMMISSION, Respondent.	)	

Petition to Review a Decision of the Federal Trade Commission

(Proceedings Had in the United States Court of Appeals for the Ninth Circuit)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, October 18, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER OF SUBMISSION

ORDERED appeal herein argued by Mr. McDannell Brown, counsel for the Petitioners, and by Mr. Alan B. Hobbes, Attorney, Federal Trade Commission, counsel for the Respondent, and submitted to the Court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, November 7, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Decree be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, *Petitioners,*	)	No. 14,346
v.	)	Nov. 7, 1955
FEDERAL TRADE COMMISSION, *Respondent.*	)	

Petition to review a decision of The Federal Trade Commission.

Before: HEALY, ORR and POPE, Circuit Judges.

ORR, Circuit Judge:

The Federal Trade Commission, acting pursuant to the provisions of 15 U.S.C.A. §45 (1951), conducted hearings and found that petitioners, in the course of certain sales and advertising activities, did employ false and misleading representations which constituted unfair and deceptive acts and practices in commerce contrary to the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C.A. §§41-58 (1951). A cease and desist order was issued. Petitioners seek a review. 15 U.S.C.A. §45(c).

Tractor Training Service, an Oregon corporation with headquarters in Portland, and Tractor Training Service, Inc., an Illinois corporation with Chicago headquarters, are substantially owned and controlled by Mr. Joy E. Badley. The Commission found that petitioners "are now and have for more than three years last past

engaged in the sale and distribution of a course of study and instruction consisting of forty-six lessons on the subject of diesel engines and tractor equipment . . . ." The course consists entirely of home study assignments. There is no laboratory training provided. The price for the course is $275, less certain discounts. In 1951 more than 2200 students were enrolled.

In 1948 petitioners Joy E. Badley and Tractor Training Service entered into a stipulation with the Commission which recognized that in the course of their advertising and field selling petitioners had misrepresented, in certain particulars, the benefits to be derived from their home study course. Petitioners agreed to desist from future falsifications and to refrain from making representations that companies in the diesel and tractor industries were backing or interested in petitioners' program; that graduates of the study course were in demand in the diesel industry; that the school maintained an employment service capable of procuring positions for its graduates, except so far as the school in fact provides this facility; that applicants for petitioners' program were screened to determine their qualifications for petitioners' course; that on the job training is available and that refunds could be had in the event of failure to pass examinations, finish the course, or secure employment.

In 1952 the Commission served its complaint charging petitioners with ignoring its agreement and continuing to employ misleading statements both oral and written. Hearings were held by a trial examiner and at

the conclusion thereof he made findings of fact which in large part were adopted by the Commission on appeal.

The first contention relied on by petitioners relates to an alleged violation by the Commission of the provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C.A. §§1001-1011 (1946). Sec. 11 of the Act, 5 U.S.C.A. §1010, provides in part that hearing examiners "shall be assigned to cases in rotation *so far as practicable* . . ." and §8(a), 5 U.S.C.A. §1007(a), provides in part that "the officer who presided . . . shall initially decide the case . . . ."

Hearings in this case were first held in Washington, D. C., starting March 10, 1952, and continuing for two days. At this hearing Examiner J. Earl Cox presided. J. E. Badley was the only witness examined. Examiner Cox ordered a recess until April 24, 1952, at which time the hearings were resumed with Examiner Everett F. Haycroft in charge. The substitution of examiners was promptly challenged by petitioners as a violation of the requirement that examiners be assigned in rotation. In overruling the objection the Commission gave as its reason for the substitution of Examiner Haycroft that other hearings were to be held by him in the western part of the United States where future hearings in the instant case were scheduled, hence the substitution was in the interests of economy. At the resumed hearings of the case Examiner Haycroft offered to strike all testimony previously taken and begin anew or, at petitioners' option, to consider the transcript of testi-

mony theretofore taken. Petitioners stood on their objection to a change of examiners. A transcript of the testimony of Mr. Badley, taken in Washington, D. C., was introduced at a subsequent hearing in Portland, Oregon, and at the Portland, Oregon hearing Mr. Badley again testified, covering substantially the entire ground gone over in the Washington, D. C. hearing.

Section 8(a) of the Administration Procedure Act provides that the initial decision shall be made by the hearing officer who presided. Examiner Haycroft made the initial decision. The fact that he did not preside over the Washington hearings in no manner changed this situation. Examiner Haycroft heard all the evidence and from the evidence formulated the first and only decision rendered. We think this was a full compliance with the requirements of §8(a).

It is contended that the substitution of examiners violated §11, 5 U.S.C.A. §1010, which requires that hearing examiners "shall be assigned to cases in rotation so far as practicable."[1] Reliance is placed by petitioners on Wong Yang Sung v. McGrath, (1949) 339 U.S. 33; United States v. L. A. Tucker Truck Lines, (1952) 344 U.S. 33; and Ramspeck v. Federal Trial Examiner's Conference, (1953) 345 U.S. 128.

In Wong Yang Sung v. McGrath, supra, the Supreme Court determined that the administrative hearings in deportation cases must conform to the requirements of

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[1]See also, Federal Trade Commission, Rules of Practice, Rule XIV to the same effect.

the Administrative Procedure Act.[2] That case does not purport to determine the allowable scope of an administrator's discretion in assigning cases "in rotation so far as possible."

The case of United States v. Tucker Truck Lines, supra, dealt with an alleged error of the Interstate Commerce Commission in assigning a hearing examiner who had not been appointed in accordance with the requirements of §11, 5 U.S.C.A. §1010. It was held that petitioner in that case waived his objection by his failure to raise it below. The present case is distinguishable from what was said in the Tucker case in this: Examiner Haycroft is a duly appointed and qualified hearing officer. In the Tucker case the hearing officer was not.

In the Ramspeck case, supra, the Supreme Court addressed itself for the first time to the question of the scope of discretion contemplated by the phrase *"in rotation so far as practicable."* It held that the Act contemplates a modicum of discretion on the part of the agency and that the classifications which the Civil Service Commission had made were a permissible modification of the rotation rule.

We learn from the briefs that several federal agencies[3] have interpreted §11 as allowing them to deviate from mechanical rotation in the interests of economical operation. The substitution here was made early in the

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[2]Congress subsequently exempted immigration cases from §§ 5, 7 and 8 of the Administration Procedure Act, 66 Stat. 163 (1952).

[3]The Coast Guard, the Civil Aeronautics Board, the Federal Trade Commission, and the Interstate Commerce Commission, are cited as instances.

proceedings. Petitioners were afforded an opportunity to start anew. There is no suggestion of any intention on the part of the Commission to deprive petitioners of a fair hearing or that Examiner Haycroft was biased or incompetent. The change of examiners in no way prejudiced petitioners. They do not so contend but insist on a mechanical application of the statute. §10(e), 5 U.S.C.A. §1009(e).

In the course of the investigation which preceded the lodging of the complaint, agents of the Federal Trade Commission visited petitioners' offices in Chicago and Portland and requested and were granted access to corporate records. Petitioners claim that the investigators thus acquired a list of delinquent accounts which was used by the Commission to locate student witnesses to testify at the hearings. This, argues petitioners, violated their rights under the IVth Amendment to the Constitution which guarantees freedom from unreasonable search and seizure, and therefore admission of the testimony of the witnesses whose identities the Commission learned from inspection of the corporate records was error.

There are three answers to this contention. In the first place no motion was made to suppress the evidence, nor was there objection to its introduction. See Federal Trade Commission, Rules of Practice, Rule XVII(d); United States v. L. A. Tucker Truck Lines, supra, and Spiller v. Atchison, T. & S. F. Ry. Co., (1920) 253 U.S. 117, 130. Second, the record discloses that petitioners freely consented to the inspection and cooperated with

the agents. Asked whether he had supplied the agents with specimens of advertising copy, Mr. Frederick L. Innes, executive vice-president of Tractor Training Service, Inc., replied: "I have no recollection of his asking for it. If he did ask for it why, I would have supplied it, because there was nothing to hide in relation to the business or the nature of our advertising or anything else. And he thanked me for my cooperation and that is the last I ever heard of him." Finally, §9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C.A. §49, provides statutory authority for Commission inspection of corporate documents such as those here involved. A reasonable demand pursuant to that authority does not violate the IVth Amendment; United States v. Morton Salt Co., (1950) 338 U.S. 632; see Wilson v. United States, (1911) 221 U.S. 361; Davis v. United States, (1946) 328 U.S. 582; Bloch v. United States, (9 Cir. 1955) ..... F.2d ..... .

Petitioners complain that the Commission heard only dissatisfied customers selected on the basis of their dissatisfaction and who were further "disgruntled" by statements made to them by Commission representatives. Twenty-seven student witnesses testified on behalf of the Commission. Seven of these, say petitioners, admitted that Commission representatives sought to prejudice them against the company in pre-hearing conferences.

The record does not support this claim. The statements of said seven witnesses as to their interviews with Commission representatives are sketchy and ambiguous.

Some of the seven claim that the agents suggested to them that they, the students, would derive little practical value from the course. Others of the seven flatly denied that any such assertions were made to them. We find no misconduct on the part of the agents, and, further, the credibility of the witnesses was a matter for the hearing examiner and Commission to resolve. Steelco Stainless Steel Inc. v. Federal Trade Commission, (7 Cir. 1951) 187 F.2d 693.

Complaint is made that prejudice resulted from the procedure adopted by the Commission in conducting numerous hearings from place to place throughout petitioners' sales territory. This procedure was adopted to avoid the necessity of transporting all the witnesses from their scattered residences to any one hearing place, a procedure employed to minimize the costs of the proceedings to both parties, which seems entirely reasonable.

Petitioners argue that Joy E. Badley should not have been made a party to the order. He is president of the Oregon corporation and Chairman of the Board of Directors of the Chicago corporation. He owns all but one share of the stock of each. He testified that he alone is responsible for promulgating the advertising and that he supervises the field agents, receiving daily reports on each man in the field. On these facts the Commission was justified in concluding that it was necessary to include Mr. Badley in its order so as to make it fully effective in preventing the practices it found illegal. Federal Trade Commission v. Standard Education Soci-

ety, (1937) 302 U.S. 112; Standard Distribution v. Federal Trade Commission, (2 Cir. 1954) 211 F.2d 7.

It is contended that the findings are not supported by substantial, reliable and probative evidence. The material facts found were: That certain representations as to the benefits to be derived from petitioners' tractor training course and the procedures they employed in teaching the course as made to prospective students were untrue. Facts supporting the finding were deprived from the testimony of twenty-seven student witnesses; from admissions contained in the 1948 stipulation as to the practices at that time; from samples of advertising copy in evidence, and the testimony of eleven expert witnesses, consisting of engineering professors and representatives of the diesel and tractor industries, including persons directly concerned with the hiring and firing of diesel mechanics. The testimony of these last named witnesses was to the effect that graduates of petitioners' tractor training course were not qualified mechanics and were not in demand in the diesel and tractor industries. Cf. Consumers Home Equipment Co. v. Federal Trade Commission, (6 Cir. 1947) 164 F.2d 972; and Hill Bros. v. Federal Trade Commission, (9 Cir. 1926) 9 F.2d 481.

The Commission's order is said to be vague. We do not think so. It prohibits petitioners from making certain specified misrepresentations. Paragraph Six is specifically pointed out. This paragraph prohibits petitioners from representing "that the earnings of individuals who have completed respondent's course of study are in excess of the average net earnings consistently

made by individuals who have completed such course over substantial periods of time under normal conditions and circumstances." This seems plain enough to us. It does not preclude all future representations by petitioners of the earning experience of their graduates. It does preclude representations that petitioners' graduates earn wages in excess of the average net earnings which they actually receive. In short, the order says no more than that future representations by petitioners must have a basis in fact. The order is clear and definite and within the discretion delegated by Congress to the Commission to prescribe appropriate remedies. See Charles of the Ritz Dist. Corp. v. Federal Trade Commission, (2 Cir. 1944) 143 F.2d 676, 679.

Order affirmed.

(Endorsed:) Opinion. Filed Nov. 7, 1955.
Paul P. O'Brien, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE et al.,	)	
Petitioners,	)	
v.	)	No. 14346.
FEDERAL TRADE COMMISSION,	)	
Respondent.	)	

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Tractor Training Service, an Oregon corporation, Tractor Training Service, Inc., an Illinois corporation, and Joy E. Badley, petitioners herein, having filed in this Court on May 5, 1954, a petition to review and set aside an order to cease and desist issued against them on March 3, 1954, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Tractor Training Service * * * [and others], Docket No. 5943"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by the Court on briefs and oral argument on October 18, 1955; and this Court having thereafter fully considered the cause and having rendered its decision on November 7, 1955, affirming said order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid peti-

tion be, and it hereby is, dismissed, that the aforesaid order to cease and desist be, and it hereby is, affirmed and enforced, and that petitioners be, and they hereby are, commanded to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

William Healy
William E. Orr
Walter L. Pope
United States Circuit Judges.

Date: November 25, 1955.

(Endorsed)
Filed DEC - 9 1955
Paul P. O'Brien,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, December 12, 1955

Before: HEALY, ORR and POPE, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Petitioners, filed December 5, 1955, and within time allowed by rule of Court for a rehearing of the above cause be, and hereby is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY, Petitioners,	)	No. 14,346.
vs.	)	
FEDERAL TRADE COMMISSION, Respondent.	)	

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and thirty-six (836) pages, numbered from and including 1 to and including 836, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the Petitioners, and certified under rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixteenth day of January, 1956.

(SEAL)

PAUL P. O'BRIEN
PAUL P. O'BRIEN, Clerk

APPENDIX B

28 U.S.C.A.

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any civil or criminal case, before or after rendition of judgment or decree;

* * * *

15 U.S.C.A. 45

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corpoation to cease and desist fom using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as herein after provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in the whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Pro-*

vided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the

public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(Sept. 26, 1914, c. 311, sec. 5, 38 Stat. 719;
Feb. 13, 1925, c. 229, sec. 2, 43 Stat. 939;
Mar. 21, 1938, c. 49, sec. 3, 52 Stat. 111;
Jan. 23, 1938, c. 601, sec. 1107(f), 52 Stat. 1028;
Jan. 25, 1948, c. 646, sec. 32(a), 62 Stat. 991;
May 24, 1949, c. 139, sec. 127, 63 Stat. 107;
Mar. 16, 1950, c. 61, sec. 4(c), 64 Stat. 21.)

Title 5, U.S.C.A.

Sec. 1004 (Sec. 5, Admin. Pro. Act).

"(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigation or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

June 11, 1946, c. 324, sec. 5, 60 Stat. 239.

Sec. 1006 (Sec. 7, Admin. Pro. Act).

"(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

"(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rules consistent with this chapter."

June 11, 1946, c. 324, sec. 7, Stat. 241.

Sec. 1007 (Sec. 8, Admin. Pro. Act).

"(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule, the entire record to be certified to it for initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

June 11, 1946, c. 324, sec. 8, 60 Stat. 242.

"Sec. 1009 (Sec. 10, Admin. Pro. Act). Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Form and venue of proceedings

(b) The form of proceedings for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required

by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all revelant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discreion, or otherwise not in accordance with law; (2) contrary to constitutional

right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

June 11, 1946, c. 324, Sec. 10, 60 Stat. 243."

Sec. 1010 (Sec. 11, Admin. Pro. Act).

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in ac-

cordance with sections 661-663, 664-669, 670-672, 673 and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts."

June 11, 1946, c. 324, sec. 11, 60 Stat. 244, amended 1949 Reorg. Plan No. 5, eff. Aug. 19, 1949, 14 F.R. 5227, 63 Stat. 1067.

"Sec. 1011 (Sec. 12, Admin. Pro. Act). Impairment of rights; effect on other laws, separability; subsequent legislation; effective date.

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the

issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

June 11, 1946, c. 324, Sec. 12, 60 Stat. 244."

FEDERAL TRADE COMMISSION RULES
(Excerpts)

RULE XIV

TRIAL EXAMINERS

All hearings pursuant to formal complaints shall be presided over by the Commission, a member of the Commission, or by a trial examiner appointed by the Commission and duly qualified as an examiner or hearing officer within the meaning of the Administrative Procedure Act. So far as practicable trial examiners shall be assigned to cases in rotation.

Subject to the published rules of the Commission and within its authority, officers presiding at hearings shall have the following powers and duties in all cases to which they are assigned by the Commission, to wit:

(8) To make and file an initial decision as provided by Rule XXII.

RULE XV

HEARINGS IN ADVERSARY PROCEEDINGS

All hearing pursuant to formal complaint shall be public unless otherwise ordered by the Commission, and such hearings shall be subject to the following conditions and requirements:

(d) The trial examiner may withdraw from a case when he deems himself disqualified, or he may be withdrawn by the Commission after timely affidavits alleging

personal bias or other disqualifications have been filed and the matter has been heard by the Commission or by a trial examiner whom it has delegated to investigate and report.

RULE XXII

TRIAL EXAMINER'S INITIAL DECISION IN ADVERSARY PROCEEDINGS

Except where he shall have become unavailable to the Commission, the initial decision in each proceeding shall be made and filed by the trial examiner who presided therein.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 667

TRACTOR TRAINING SERVICE, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 23-32) is reported in 227 F. 2d 420.

JURISDICTION

The judgment of the court of appeals (Pet. 33-34) was entered on December 8, 1955, and a timely petition for rehearing was denied on December 12, 1955 (Pet. 35). The petition for a

writ of certiorari was filed on February 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After two days of hearings in Washington, D. C. in a Federal Trade Commission administrative proceeding, at which only one witness testified, the examiner adjourned the hearings to reconvene in the midwest and far west. Prior to the next hearing session the Commission, "in the interest of economy," appointed a substitute examiner to conduct further proceedings. At the reconvened hearings, the new examiner offered to hear *de novo* the testimony previously taken in Washington, but petitioners objected. The witness who had testified in Washington then testified further with respect to the same matters. Petitioners make no claim that they were prejudiced by the change in examiners.

The question presented is whether under such circumstances the change in examiners constituted prejudicial error in violation of the Administrative Procedure Act because

1. The examiner who prepared the recommended decision had not presided at the initial hearings in Washington, or

2. The assignment of the second examiner was made in alleged violation of the requirement in Section 11 that examiners be assigned to cases "in rotation so far as practicable."

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 45, provides in part as follows:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, are as follows:

> Sec. 5 * * * (c) * * * The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. * * * [60 Stat. 239-240, 5 U.S.C. 1004(c).]
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> Sec. 8 * * * (a) * * * In cases in which the agency has not presided at the reception of the evidence, the officer who presided * * * shall initially decide the case or the agency shall require (in specific cases or by general rule) the

entire record to be certified to it for initial decision. * * * [60 Stat. 242, 5 U. S. C. 1007(a).]

Sec. 10 * * * (e) * * * the [reviewing] court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243, 5 U. S. C. 1009(e).]

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable * * *. [60 Stat. 244, 5 U. S. C. 1010.]

STATEMENT

On January 18, 1952, the Federal Trade Commission issued a complaint (R. 1-18) charging that petitioners had engaged in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act by making a number of false and misleading representations in connection with the sale of a home study course. After extensive administrative proceedings, the Commission, on March 3, 1954, found that petitioners' practices violated the Act (R. 70-93), and issued a cease-and-desist order (R. 93-95) prohibiting the misrepresentations.

The pertinent facts as found by the Commission are not in dispute, and may be summarized as follows:

Petitioners, two correspondence schools and their principal stockholder and "guiding spirit", sell and distribute through the mails a 46-lesson course on the subject of diesel engines and tractor equipment. The price for the course is $275.00, less certain discounts. During the year 1951 the two schools had an enrollment of 2263. (R. 72-74.)

In connection with the sale of their course, petitioners, in their advertising and through oral statements by their salesmen, have made numerous false and misleading representations. Such misrepresentations have included: (1) that there is a great demand for graduates of the schools as diesel mechanics; (2) that graduates of the course are assured employment; (3) that the students will be given "on-the-job training" for which they will be paid; (4) that the schools provide free "shop training" to graduates; and (5) that the schools' placement service will obtain jobs for graduates at $2.50 or $3.50 per hour or at $75.00 per week and eventually higher wages (R. 81-93). These misrepresentations "have had the capacity and tendency to deceive members of the public" and have induced "the purchase of substantial numbers" of the correspondence courses (R. 92).

The only questions raised by petitioners involve the propriety of the Commission's changing hearing examiners after the hearings had begun. The facts with respect to such change are as follows:

The complaint designated Examiner Cox to conduct the hearings (R. 13-14). He presided at the initial two-day session held in Washington, D. C., on March 10 and 11, 1952 (R. 108-195), at which

only one witness (petitioner Badley, the "guiding spirit" of both schools, R. 74) testified (Pet. 25). At the end of the second day Examiner Cox, after being advised that further hearings would be required outside of Washington, including the Pacific Northwest (R. 191-192), adjourned the hearing to reconvene in Ohio on April 24, 1952 (R. 193).

Prior to the reconvened hearing the Commission, over petitioners' objection (R. 33), substituted Examiner Haycraft for Examiner Cox (R. 32). The Commission stated (R. 34-35) that the substitution was made "in the interest of economy." It appeared that Examiner Haycraft had other hearings in the Pacific Northwest (Pet. 25) but Examiner Cox did not (R. 193). The Commission pointed out (R. 34-35) that the change in examiners would not prejudice petitioners, since they "may properly request the present hearing examiner to strike from the record and retake all or any part of the testimony and other evidence" taken by Examiner Cox.

When the hearing was reconvened before Examiner Haycraft in Ohio, he asked petitioners whether they objected to the "use of the testimony that has already been taken" (R. 195), in which event "the only thing to do then is to require Mr. Bellinger [Commission counsel] to take it over again" (R. 196). Petitioners, renewing their objection to the change in examiners, stated that "[w]e are going to object to starting the proceedings *de novo* and taking this testimony over again * * *" (*ibid.*). However, after pointing out that

the witness who had testified in Washington was not present at the hearing (R. 197), petitioners' counsel suggested that decision on whether the testimony should be retaken be postponed until subsequent hearings scheduled to be held in Portland, Oregon, and the examiner so ruled (R. 197-198).

At the Portland hearing, Examiner Haycraft again asked petitioners whether they wished to retake the testimony given at Washington (R. 429). Petitioners' counsel, on the basis of his "understanding" that his objection to the change in examiners "would not be affected one way or another" by whether the prior transcript was used, stated that "I'm prepared to agree that the transcript of the Washington hearing be used, rather than putting us or the Commission to the expense of going through it again" (*ibid.*).

Mr. Badley, the witness who had testified in Washington, then gave further testimony in Portland which generally repeated his earlier testimony except for identifying exhibits (R. 430-457, 819-822).

On May 1, 1953, Examiner Haycraft filed his initial decision (R. 39-59), holding that petitioners had violated the Act. In affirming that decision, the Commission also reaffirmed its prior action in substituting examiners (R. 66-67). The Commission noted that on two separate occasions Examiner Haycraft had offered to take the Washington testimony again. It stated that in those rare cases where it "clearly appears" that substitution will effect "great saving to the Government" and is

likely to result in only 'slight inconvenience and expense to respondents," it is the Commission's "duty to take the steps required to effect such economy" (R. 67).

The Court of Appeals for the Ninth Circuit unanimously affirmed the Commission's order (Pet. 23-34). The court held that the change of examiners did not violate any provision of the Administrative Procedure Act and "in no way prejudiced petitioners" (Pet. 28). It ruled (1) that the Commission's procedures constituted "full compliance" with the requirement in Section 8(a) of the Act that the initial decision be made by the examiner who presided (Pet. 26), and (2) that Section 11, which requires that examiners be assigned in rotation "so far as practicable," does not require mechanical rotation but gives the Commission reasonable discretion to depart from mechanical rotation "in the interests of economical operation" (Pet. 27-28). It noted that the substitution was made early in the proceedings, that petitioners were "afforded an opportunity to start anew," and that there was "no suggestion" of any intention to deprive petitioners of a fair hearing or that Examiner Haycraft was "biased or incompetent" (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 9-12) that the substitution of Examiner Haycraft for Examiner Cox violated the provision of Section 11 of the Administrative Procedure Act that, "so far as practicable," examiners should be appointed in rotation. They

argue that the assignment of Examiner Haycraft was not made in rotation, but for reasons of economy. We submit, however, that the qualification in Section 11 that assignments be made in rotation "so far as practicable" authorizes the Commission to assign an examiner out of rotation where, as here, it appears that such assignment would achieve desirable economies and would cause the respondent only slight inconvenience and expense.

In *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U. S. 128, this Court rejected a similar attempt to construe Section 11 as requiring assignment of examiners by "mechanical rotation" (p. 140).[1] The Court there upheld a rule of the Civil Service Commission which, by authorizing assignment of examiners so as to reflect the difficulty and importance of cases, necessarily permitted their assignment out of rotation. The Court rejected the contention that the rule violated the rotational assignment provision, holding that it represented "an allowable judgment by the Commission as to what was practicable" (*ibid.*).

Similarly, we think that it was an "allowable judgment" as to what was "practicable" for the Commission to have concluded here that interests

[1] The *Ramspeck* case, upon which petitioners also rely (Pet. 11-12), is the only one of the four decisions of this Court that they cite which deals with the question of assignment in rotation. The other three cases cited (*Wong Yang Sung* v. *McGrath,* 339 U.S. 33, *Riss & Company* v. *United States,* 341 U.S. 907, and *United States* v. *Tucker Truck Lines,* 344 U.S. 33) all deal with other provisions of Section 11.

of economy justified assigning Examiner Haycraft to this case out of rotation in order to avoid the substantial added travel expense which the conduct of further hearings by Examiner Cox would have entailed. Examiner Haycraft had other hearings scheduled in the western area, only one witness had testified in Washington, and any possible prejudice to petitioners was avoided by giving them the opportunity to begin the hearing *de novo*. Under such circumstances, the practicalities of the situation justified the Commission in departing from "mechanical rotation."

2. Petitioners further contend (Pet. 13-18) that since Examiner Haycraft did not preside at the two-day hearing session in Washington, his preparation of the initial decision violated Sections 5(c) and 8(a) of the Administraitve Procedure Act. Those Sections require that, except where he is "unavailable" to the agency, the officer who presides at the hearing shall make the recommended or initial decision. The short answer to this contention is that Examiner Haycraft, who prepared the initial decision, did preside at the hearing. Except for the first two days, he conducted the entire proceeding, and he twice offered to rehear the testimony taken on those two days, but petitioners did not wish to do so. Moreover, to whatever extent Examiner Haycraft's initial decision may have turned on his evaluation of witness credibility, it is significant that the witness who testified in Washington also testified before Examiner Haycraft with respect to the same matters, and that Ex-

aminer Haycraft therefore had full opportunity to observe his demeanor on the stand.

The instant case, therefore, is clearly distinguishable from *Gamble-Skogmo* v. *Federal Trade Commission,* 211 F. 2d 106 (C. A. 8), upon which petitioners rely (Pet. 13-14). In *Gamble-Skogmo* the examiner who presided at the hearings retired from Government service before preparing the recommended decision, and that decision was prepared by a substitute examiner who had heard none of the testimony. The court of appeals set aside the Commission's order on the ground that the retirement of the first examiner had not made him "unavailable" within the meaning of Section 5(c), and that the preparation of the initial decision by the recommended examiner was therefore improper. In that case, however, the substitute examiner had specifically denied the respondent's request for a hearing *de novo* and the court of appeals, in setting aside the Commission order, pointed out that since credibility was "a salient factor" in the recommended decision, Section 5(c) required that it be made by an examiner who had seen the witnesses. In the instant case, on the other hand, the examiner who made the initial decision did observe all the witnesses, and he twice offered to begin the proceedings *de novo*—offers which petitioners rejected. Under these circumstances, his preparation of the initial decision was proper. Cf. *National Labor Relations Board* v. *Dixie Shirt Co.,* 176 F. 2d 969 (C. A. 4); see also *National Labor Relations Board* v. *Stocker Mfg. Co.,* 185 F. 2d 451 (C. A. 3).

3. Section 10(e) of the Administrative Procedure Act provides that in judicial review of agency action "due account shall be taken of the rule of prejudicial error." Petitioners make no contention that they were in any way denied a fair hearing, or that Examiner Haycraft was biased. On two occasions they were given an opportunity to have the Washington testimony heard anew, but they refused to do so. Since petitioners were therefore "not actually prejudiced by the conduct or manner of appointment of the examiner" (*United States* v. *Tucker Truck Lines,* 344 U. S. 33, 35), the court of appeals correctly concluded that the rule of prejudicial error required affirmance of the Commission's order.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no important question is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 376250 1110

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In the Supreme Court
of the United States

TRACTOR TRAINING SERVICE, a corporation, TRACTOR TRAINING SERVICE, INC., a corporation, and JOY E. BADLEY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Reconsideration

Come now the petitioners, and respectfully petition the Court for a reconsideration of its petition for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review its decision affirming an order of the respondent, Federal Trade Commission, upon the following grounds, to-wit:

1. The Supreme Court has held that an administrative agency cannot disregard the provisions of Section 11 of the Administrative Procedure Act because compliance therewith will "cause inconvenience and added expense." *Wong Yang Sung vs. McGrath,* 339 U.S. 33, p. 46; 70 S. Ct. 445, p. 452.

In the instant case the Federal Trade Commission deliberately disregarded the provisions of Section 11 of the Administrative Procedure Act (and several other provisions in addition) when it changed hearing examiners during the proceedings and did so upon the explicit and express ground of inconvenience and expense, and this conduct was approved by the decision of the United States Court of Appeals.

2. The Supreme Court of the United States has held that a litigant who makes a timely demand is entitled to a hearing examiner chosen as the Act provides and that a "defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection during the hearing." *U. S. vs. L. A. Tucker Truck Lines*, 344 U.S. 33, pp. 36-38; 73 S. Ct. 67, pp. 68 and 69. (Citing *Riss & Company vs. U. S.*, 341 U.S. 907; 71 S. Ct. 620.)

In the instant case, petitioners made timely and repeated objections to the irregular and illegal procedure followed by the Federal Trade Commission (violations of Sections 7(a) and 11 of the Administrative Procedure Act), all of which were overruled. Yet this conduct by the Commission was approved by the decision of the United States Court of Appeals.

3. The United States Supreme Court has held that Constitutional due process requires that in administrative proceedings "The one who decides must hear," *Morgan vs. U. S.*, 298 U.S. 468, 36 S. Ct. 906 (911). The

Administrative Procedure Act (Secs. 5(c), 7(b) and 8(a)) repeatedly stipulates that the initial decision shall be made by the hearing examiner who heard the case unless he shall have become "unavailable," *Gamble-Skogmola vs. T.C.T.*, 211 F. (2d) 106; *Kuhn vs. C.A.B.*, 183 F. (2d) 839 (Syl. 4); *N.L.R.B. vs. Stoker Co.*, 185 F. (2d) 451 (Syl. 6).

In the instant case the initial decision was made by the substitute examiner who had heard only PART of the case and although the original hearing examiner who had heard the first part of the case was not "unavailable."

* * * * *

The decision of the United States Court of Appeals for the Ninth Circuit in this case, upholding the clear, unequivocal violation of FIVE requirements of the Administrative Procedure Act is in irreconcilable conflict with the herein cited decisions of the United States Supreme Court and the United States Court of Appeals in other Circuits.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McDANNELL BROWN,
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It is hereby certified that the foregoing petition is presented in good faith and not for purposes of delay.

/s/ McDANNELL BROWN,

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